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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of:)

Tariff Filing Requirements)
for Nondominant Carriers)

CC Docket No.
93-36

OPPOSITION OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc. ("CWI"), by its attorney, respectfully submits the following comments in opposition to the petitions for reconsideration filed by Bell Atlantic Corp. ("Bell Atlantic") and SBC Communications, Inc. ("SBC").¹ CWI is a nondominant domestic interexchange carrier, providing services to small, medium and large businesses throughout the country.² The Commission's September 27, 1995 Order ("Order") appropriately weighs the regulatory concerns raised by nondominant carrier tariffs and contracts. Neither petition raises a valid reason why the Commission should change that decision on reconsideration. Accordingly, the petitions should be denied.

Attest: Secretary
Cable & Wireless, Inc.

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¹ See Report No. 2114, 60 Fed. Reg. 62091 (Dec. 4, 1995). Due to the government shutdown, the FCC's offices were closed on December 19, 1995, the date on which this opposition was due. Pursuant to Section 1.4(j) of the Commission's rules this opposition is being filed on the first business day thereafter that the FCC's offices are open.

² CWI is a nondominant carrier for most international routes as well.

I. THE COMMISSION MAY EXEMPT NONDOMINANT CARRIERS FROM FILING CARRIER-TO-CARRIER CONTRACTS

Bell Atlantic claims that Section 211 of the Communications Act, 47 U.S.C. § 211, requires that carrier-to-carrier contracts entered into by nondominant carriers be filed with the Commission. This argument misconstrues Section 211, which grants the Commission the authority to exempt nondominant carrier contracts, as it did in this instance.

Section 211 contains two subsections. The first, Section 211(a), requires carriers to file copies of all contracts entered into with other common carriers.³ The second subsection, Section 211(b), grants the FCC the authority "to exempt any carrier" from the filing requirement for "such minor contracts as the Commission may determine."⁴ Thus, the compulsory language of Section 211(a) is tempered by the Commission's discretionary authority to exempt carriers pursuant to Section 211(b). All carrier-to-carrier contracts must be filed with the FCC, except for those contracts the Commission determines are "minor."

³ 47 U.S.C. § 211(a). Section 211(a) states:

Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

⁴ Id. § 211(b).

Bell Atlantic claims that the "minor" contracts exemption applies only to the Commission's authority pursuant to Section 211(b) to require additional contracts to be filed. This contention does not withstand scrutiny. Section 211(b) contains two independent clauses. The first clause empowers the Commission to require the filing of other (i.e., non carrier) contracts entered into by common carriers. The second, empowers the Commission "also" to exempt any carrier from submitting contracts deemed to be "minor." Both of these are properly read to modify, in different ways, the directive of Section 211(a) that "every" carrier-to-carrier contract be filed. The first clause broadens the scope of Section 211(a) by allowing the FCC to compel the filing of other types of contracts, while the second clause -- the minor contracts clause -- lessens its scope by allowing the FCC to exempt some contracts for which filing would serve no purpose.

Moreover, the Commission was correct in concluding that carrier-to-carrier contracts entered into by nondominant carriers are "minor." CWI enters into contracts with other carriers both as a buyer and a seller of excess network capacity. As a buyer, the price CWI pays is determined by the prevailing market price. CWI does not have a sufficiently high volume of purchases to extract an anticompetitive price. Nor does it have the market power to compel its seller to unreasonably discriminate in favor of CWI. Similarly, as a seller, CWI's price and other terms are constrained by the availability of excess capacity from other sources such as AT&T, MCI, Sprint, and LDDS Worldcom. Thus, if it attempted to charge an unreasonable price or to impose an unreasonable condition, its buyer likely would turn to one of these alternative

vendors. The same result would occur if CWI attempted to unreasonably discriminate in favor of (or against) a competitor carrier. As a result, CWI's carrier-to-carrier contracts are minor in the sense that they do not implicate any of the concerns addressed in the Communications Act.

Therefore, the Commission's assessment of carrier-to-carrier contracts entered into by nondominant carriers is correct. These contracts, because the carriers lack the market power necessary to extract unreasonable prices or to engage in unreasonable discrimination, are of lesser importance than dominant carrier contracts. Filing such contracts would not serve any useful regulatory purpose. Moreover, the Commission has the statutory authority to exempt carriers from filing these contracts. Accordingly, the Order appropriately exempts nondominant carriers from filing their carrier-to-carrier contracts with the Commission.

II. SBC'S PETITION RAISES ISSUES BEYOND THE SCOPE OF THIS PROCEEDING

While SBC does not challenge the merits of the Commission's decision to reimpose its tariff filing rules applicable to nondominant common carriers, it claims that the Commission must broaden its rulemaking to include tariff filing requirements for dominant carriers as well.⁵ The Commission is not required to follow SBC's suggestion.

⁵ SBC Petition at ii, 8-11.

An administrative agency receives the "highest deference" from a reviewing court when it decides "priorities among issues, including the sequence and grouping in which it tackles them."⁶ The Administrative Procedure Act entrusts the agency to exercise its expertise to determine the most appropriate sequence in which to address the issues delegated to it under its governing statute. Here, the FCC has decided to treat nondominant carrier issues in this proceeding, and dominant carrier issues in its LEC Price Cap proceeding.⁷ SBC's petition amounts to a request that the Commission change that "sequence and grouping" so that dominant and nondominant carrier tariff issues are addressed together. The Commission has no such obligation and it may adhere to the order it had determined to be the best course for addressing these issues.

Moreover, the Commission's decision to group these issues separately is a reasonable one. Dominant carriers and nondominant carriers present different regulatory concerns, which arise from the fact that dominant carriers possess market power while nondominant carriers do not. Thus, the necessity for tariff filing notice periods and other informational and procedural requirements differ, depending upon whether the carrier filing the tariff has the ability to exercise its market power in ways contrary to the public interest. It makes the most sense, therefore, to consider these tariffing issues separately.

⁶ Associated Gas Distributors v. FERC, 824 F.2d 981, 1039 (D.C. Cir. 1987).

⁷ See Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1.

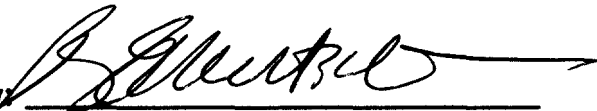
CONCLUSION

For the foregoing reasons, the Commission should deny the two petitions for reconsideration and should affirm its Order in its entirety.

Respectfully submitted,

CABLE & WIRELESS, INC.

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